Supreme Court, U.S.
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No. 04-229

IN THE

Supreme Court of the United States

COUNTY OF MILLE LACS,
Petitioner,

v.

MELANIE BENJAMIN, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF OF PETITIONER COUNTY OF MILLE LACS

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ARGUMENT

I. MOST OF THE "STATEMENT OF THE CASE" AND A SUBSTANTIAL PART OF THE "REASONS FOR DENYING THE PETITION" IN THE BRIEF IN OPPOSITION MISCHARACTERIZE THE RECORD IN THIS CASE.

The Mille Lacs Band would have this Court believe that a resurrected 1855 Mille Lacs Reservation is of little or no consequence to the non-members that constitute the majority of the population and own and populate approximately ninety percent (90%) of the area. The Band attempts to shore up this position by denying that it has attempted to exercise jurisdiction over non-members, despite pages of Band statutes that expressly claim that jurisdiction. This argument is untenable.[1]

A. In the district court, Petitioner Mille Lacs County and Petitioner First National Bank of Milaca submitted evidence that squarely refuted that position specifically with respect to non-members. *See* Pet. for a Writ of Cert. (filed by Petitioner County of Mille Lacs) at 14; Pet. for a Writ of Cert. (filed by Petitioner First National Bank of Milaca) at 9-14, 20-23.

B. In addition, the State of Minnesota, as amicus curiae, has recounted actions by the Mille Lacs Band before the Environmental Protection Agency that further undermine the credibility of the Brief in Opposition submitted by the Mille Lacs Band in this respect. As Minnesota explains, two Environmental Protection Agency examples make the point. Br. of State of Minn. as Amicus Curiae in Supp. of Pet'rs at 6-7.

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[1] Even with reference to Band members, the Brief in Opposition is incomplete. Compare discussion in the Brief in Opposition regarding the sheriff's deposition testimony that would lead one to believe that the "Band and its members had consistently complied with county zoning regulations" on fee land, with correspondence in the record from the Band Commissioner of Administration that substantiates prolonged non-compliance by the Band and Band members (and eventual compliance "under protest" immediately prior to the filing of this lawsuit). Br. in Opp'n at 8.

First, in the Underground Injection Control Program of the Environmental Protection Agency:

> [t]he Band applied to regulate septic systems in the *entire* 1855 Treaty reservation area and *asserted* in its application that it had authority to regulate *all* persons, both Band members and *non-members*, within the disputed reservation area.

Id. at 6 (emphasis added).

Secondly, with reference to the Non-Point Source Management Program of the Environmental Protection Agency:

> [t]he Band again asserted that the reservation boundary was the *1855 Treaty boundary* and that it had jurisdiction over all Band and *non-Band* members within this area.

Id. at 7 (emphasis added).

Of course, participation of the Mille Lacs Band in the Environmental Protection Agency process was founded on the express recognition of the Environmental Protection Agency: (1) that the Band established a claim to the entire 1855 Reservation by approved Band statutes, and (2) that the Band established a claim to jurisdiction over everyone in the area, also by approved Band statutes. The two volumes of Mille Lacs Band Statutes published by West Publishing Company confirm the Band's claim to the 1855 Reservation and the Band's claim to jurisdiction over everyone within that reservation. Mille Lacs Band Statutes Annotated, Volume 1, Constitution and Bylaws of the Minnesota Chippewa Tribe, Titles 1 to 15 (West Pub. Co. 1996). Mille Lacs Band Statutes Annotated, Volume 2, Executive Orders and Commissioner's Orders, Titles 16 to 25 (West Pub. Co. 1996). Co. Pet. App. 111a-114a.

In this respect, the Environmental Protection Agency's ultimate grant of "treatment as a state" designation for the Mille Lacs Band (or for any Indian tribe) is based on an Environmental Protection Agency finding, required by fed-

eral statute, that the tribe has jurisdiction over the area and all persons with that area. Br. of State of Minn. as Amicus Curiae in Supp. of Pet'rs at 4-5.

C. The Brief in Opposition also mischaracterizes the nature of the real estate disclosures. Br. in Opp'n at 7, n.2. Disclosures by so called "local" real estate agents were, in fact, contested reservation status disclosures of adverse and significant material facts required by a State of Minnesota agency, pursuant to State of Minnesota statutes and State of Minnesota rules. *See* Co. Pet. App. 201a-206a.

> [l]icensees shall disclose to any prospective purchaser *all material* facts pertaining to the property, of which the licensee is aware, which could *adversely* and *significantly* affect an ordinary purchaser's use or enjoyment of the property, or any intended use of the property of which the licensee is aware.

Minn. R. 2805.1400, subp. 3 (2003).

D. The Brief in Opposition further mischaracterizes the conditions in the area and underlying causes for a state of "civil unrest" with "public safety risks" that do not exist. Br. in Opp'n at 6. According to the Mille Lacs Band, a statement from a former attorney for the County credibly attributes the source for this purported state of affairs to "misinformation" from certain County residents. This argument is not persuasive.

The fact that a contract attorney from outside the County agreed with the *Band's* mischaracterization of the significance of reservation status is of absolutely no consequence in this case. In January of 2000, this contract attorney, with no prior experience in Federal Indian Law, sought to advise the County on this issue shortly after she contracted with the County to act as its attorney. Evidently, this attorney found the Band's argument regarding the insignificance of reservation status persuasive and the County did not agree. The County unanimously, and without regard to political affilia-

tion, squarely rejected the misinformed views of the attorney on this subject. The County also limited any further involvement of the attorney in this case and thereafter specifically sought legal representation from other sources that did not have any relationship or contacts with the Mille Lacs Band. Through the entire process, the County publicly maintained that the majority of the residents in the County agreed with the position of the County in this respect.[2]

Moreover, another attorney who lived in the County at the time (fifth generation Mille Lacs County resident) was elected as the Mille Lacs County Attorney. County Attorney Jan Kolb clearly disagreed with the substance of the contract attorney's "misinformation" correspondence. County Attorney Kolb set the record straight. Ms. Kolb concluded that "'Indian country' consequences are considerably more complex and problematic . . ." *See* Co. Ct. Appl's. App. at 484.

The County submits that "arguments" of this kind, which appear throughout the "Statement of the Case" and the "Reasons for Denying the Petitions," undermine the persuasiveness of the Brief in Opposition.

II. ADDITIONAL FACTORS SUPPORT THE POSITION OF THE COUNTY REGARDING STANDING IN THIS CASE.

The Mille Lacs Band maintains that the decision in this case regarding standing does not conflict with "any decision of this Court or any other court." Brief in Opposition at 11. In the Petition, the County has set forth the cases that support the opposite conclusion. Nothing in the Brief in Opposition undermines that analysis.

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[2] Thereafter, the County did not offer to renew any contract with the attorney or otherwise encourage her to move to or seek elected office in Mille Lacs County. The subsequent disclosure that the Mille Lacs Band had contributed hundreds of dollars to the attorney's political campaign in another county (where the Band had no interests) while she was still working for Mille Lacs County, is also a matter of record in the County.

In addition to the general standing cases cited by the County and the Bank, both the County and the Bank rely specifically on the reservation status case of this Court in *Rosebud Sioux Tribe*. The one paragraph in the Brief in Opposition that even mentions *Rosebud Sioux Tribe* does not detract from the significance of that decision as set forth in the Petitions. Br. in Opp'n at 12-13.

In addition, the one sentence in a footnote in the Brief in Opposition directed to the other major decision of this Court that the County and the Bank rely on, *Virginia v. Hicks*, 539 U.S. 113 (2003), is clearly erroneous. In that single sentence, the Band maintains that *Virginia v. Hicks* can be distinguished because there is "no similar judgment limiting county law enforcement in this case." Br. in Opp'n at 19, n.6. In fact, the decision of the Minnesota Supreme Court in *State of Minn. v. Stone*, 572 N.W.2d 725 (Minn. 1997), does precisely that. *See* the limitations on county law enforcement explicitly set forth in Stone, discussed in the County's Petition at 4.

Moreover, the Brief of South Dakota and North Dakota as *Amicus Curiae* further undermines the lack of standing argument of the Mille Lacs Band. Br. of South Dakota and North Dakota as *Amicus Curiae* in Supp. of Pet. for Writ of Cert., *County of Mille Lacs v. Benjamin, et al.* (No. 04-229). In addition to the main argument of those States supporting the importance for state or other governmental entities to be able to initiate declaratory judgment actions in federal court when questions of reservation status can not be resolved, the *amici* States set forth supplemental authority on standing from this Court that generally supports some of the legitimate governmental concerns of the County. *See* Br. of South Dakota and North Dakota as *Amicus Curiae* in Supp. of the Pet. for Writ of Cert. at 3-5, (discussing *Alfred L. Snapp & Son v. Puerto Rico*, 458 U.S. 592 (1982).)

Moreover, *Snapp & Son* also relies on the decision of this Court in *Gladstone v. Village of Bellwood*, 441 U.S. 91

(1979). *Gladstone* expressly lists other local governmental concerns regarding standing shared by Mille Lacs County in this case. In *Gladstone*, this Court noted that the Village of Gladstone (with governmental powers similar to those of Mille Lacs County and similar to those of amicus City of Wahkon, *see generally* Br. *Amici Curiae* of City of Wahkon, Township of South Harbor, and Lake Mille Lacs Association, Inc., in Supp. of Pet., *County of Mille Lacs v. Benjamin, et al.* (No. 04-229)) had standing to challenge events that threatened the tax base of that governmental entity.[3]

> The adverse consequences attendant upon a "changing" neighborhood can be profound. If petitioners' steering practices significantly reduce the total number of buyers in the Bellwood housing market, *prices may be deflected downward*. This phenomenon would be exacerbated if perceptible increases in the minority population directly attributable to racial steering precipitate an exodus of white residents. . . . *A significant reduction in property values directly injures a municipality by diminishing its tax base, thus threatening its ability to bear the costs of local government and to provide services*. Other harms flowing from the realities of a racially segregated community are not unlikely. As we have said before, "[t]here can be no question about the importance" to a community of "promoting stable, racially integrated housing." . . . . If, as alleged, petitioners' sales practices actually have begun to rob Bellwood of its *racial balance and stability*, the village has standing to challenge the legality of that conduct.

Gladstone, 441 U.S. at 109-111 (emphasis added).

At the very least, the record below substantiates that the Band's actions, to date, have contributed and continue to

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[3] The *amicus* Township of South Harbor would also be impacted to a lesser extent. *Gladstone*, 441 U.S. 91, 109-111 (1979).

contribute to a reduction in property values in the contested area. Courteau Dep., Reply App. A.[4]

Gladstone holds that local governments have standing because a reduction in property values threatens the entity's ability to bear the costs of local government and provide services. Common sense supports that holding. The courts below should have considered the type of argument submitted in *Gladstone* in support of the standing of the County.

Moreover, a resurrected 1855 reservation facilitates the Band's removal of real property from the tax rolls by the placement of that property in trust. This fact, together with the extensive reacquisition of property with casino profits and the uniform tax protests filed in conjunction with that property is of substantial concern to the County.

III. THIS COURT SHOULD ALSO SETTLE THE IMPORTANT QUESTION OF FEDERAL LAW INVOLVING THE SCOPE AND CONSTRUCTION OF THE DECLARATORY JUDGMENT ACT PRESENTED IN THIS CASE.

The County would submit that contrary to Rule 1, Federal Rules of Civil Procedure, this action has not been determined in a just, speedy and inexpensive manner. On the merits of the reservation status issue, tens of thousands of pages of legal and historical documents, interrogatories and depositions, including the County's brief on the merits, have been processed and submitted in this case to date. Nevertheless, the opinions in this case do not provide any real or meaningful

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[4] Mr. Courteau's reference to his friend that maintained that real property valuations were off their potential by as much as 25 to 30 percent because of reservation status presented the same information in oral and written testimony to the United States Senate Committee on Indian Affairs. Testimony of Darrel Smith Before the United States Senate Committee on Indian Affairs (9/24/96). Mr. Smith has worked on this question for the last decade with others from many reservation areas throughout the Country.

guidelines or authority regarding the declaratory judgment act and dismissal of this case.

It is true that part of the problem centers around the fact that the Mille Lacs Band committed almost unlimited financial resources in resisting this declaratory judgment claim (Band with tens of millions of dollars in casino profits,—several million dollars already spent by the Band, the Bank and the County). But the more significant problem in this case is that the courts below were able to ignore the general rule in the circuit that the declaratory judgment act should be liberally construed. Moreover, the courts were not bound by any decision of this Court that would require that result within meaningful guidelines.

This liberal construction issue was addressed in the County's Petition at 7. As the Petition noted, every circuit has adopted liberal guidelines for the construction of the declaratory judgment act, including the Eighth Circuit. *Id.* This Court also needs to decide that important question of federal law and, in the process, set forth the guidelines for the declaratory judgment act that are sorely needed.

IV. THE COUNTY RESPECTFULLY SUGGESTS THAT THIS COURT INVITE THE SOLICITOR GENERAL TO EXPRESS THE VIEWS OF THE UNITED STATES.

This Court has invited the Solicitor General of the United States, almost as a matter of course, to express the views of the United States regarding certiorari in federal Indian law cases such as this where the underlying dispute involves reservation status. *See e.g.* Mem. of the United States as *Amicus Curiae* at 1, *DeCoteau v. Dist. County Ct.*, 420 U.S. 425 (1975) (No. 73-1148); Mem. for the United States as *Amicus Curiae* at 1, *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977) (No. 75-562); Br. for the United States as

Amicus Curiae Supporting Resp't at 1, *Solem v. Bartlett*, 465 U.S. 463 (1984) (No. 82-1253).[5]

In the instant case, a letter opinion from an attorney in the office of the field solicitor of the Department of the Interior in St. Paul, Minnesota, purportedly resurrected the 1855 Mille Lacs Reservation. Inexplicably, the letter opinion did not cite or mention the 1913 Mille Lacs litigation or the decision of this Court in that case (both premised on reservation disestablishment). *United States v. Mille Lac Band of Chippewa Indians*, 229 U.S. 498 (1913).[6] The Environmental Protection Agency and other federal agencies have relied upon that letter opinion at the suggestion of the attorneys for the Mille Lacs Band.

Neither the Solicitor for the Department of the Interior nor the Solicitor General of the United States has expressed their views on this important question. The County respectfully submits that it would be appropriate for the Court to extend that invitation to the Solicitor General of the United States in this case.

The fact that the United States was the named defendant in *United States v. Mille Lac Band of Chippewa Indians*, 229 U.S. 498 (1913) (with the lawsuit and the decision premised on reservation disestablishment), adds substance to the suggestion. The United States could submit an authoritative explanation of the 1913 Mille Lacs litigation from the perspective of a participating litigant.

In addition, the United States played a substantial amicus curiae role in *Rosebud Sioux Tribe*, 430 U.S. 584 (1977), supporting the claims of the Rosebud Sioux Tribe regarding

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[5] The Court also invited the Solicitor General of the United States to express the views of the United States in many other cases involving the issues of Federal Indian Law.

[6] Excerpts from the conclusions in the letter opinion are reprinted in Reply App. B.

reservation status. In fact, in *Rosebud Sioux Tribe* this Court specifically noted the argument of the United States in several instances. *Rosebud Sioux Tribe*, 430 U.S. at 485, 601 n.24, 604 n.27 ("urged" "most fervently" by the United States), 613, 614 n.47. Again, Petitioners in the instant case rely extensively on *Rosebud Sioux Tribe*. And, as noted above, standing was not raised by the United States or anyone else in *Rosebud Sioux Tribe*. For this additional reason, it is respectfully submitted that the views of the United States in this case should be a matter of record in this Court.

CONCLUSION

For the reasons stated in the Petition for a Writ of Certiorari and the reasons stated in this Reply Brief, and in view of the conflict of the decision below with past decisions of this Court, the Court may also wish to consider summary reversal. Alternatively, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

EXCERPTS FROM COURTEAU DEPOSITION

[SLONIM] Q Are you aware of any information indicating that the dispute has affected property values within the county?

[COURTEAU] A That's a very general question. I know we have had letters, I have seen letters in the newspapers that have said, you know, "Tired of all the uncertainty that this issue is creating. I'm going to sell my property and move."

I've received phone calls from people telling me they're uncertain whether they want to buy property or develop property within the area in dispute. And I think *all those kinds of things lumped together are likely to have an affect [negative] on property valuations.*

I'm very concerned about that as a commissioner because the County relies heavily, you know, on the property tax for its revenues.

[SLONIM] Q Has there been—

[COURTEAU] A *—for its budgetary purposes.*

* * *

[SLONIM] Q Are you aware of information about the effect of reservation status on the property values on any other reservations?

[COURTEAU] A Yes.

[SLONIM] Q Which ones?

[COURTEAU] A Standing Rock.

[SLONIM] Q Where is that reservation?

[COURTEAU] A South Dakota.

[SLONIM] Q And what's the, as you understand it, what's the status of that reservation?

[COURTEAU] A What's the what?

[SLONIM] Q What's the status of that reservation; is that an existing reservation?

[COURTEAU] A Yes.

[SLONIM] Q What effect has reservation status had on property values there?

[COURTEAU] A A friend has told me that he believes the valuations are *off their potential* by as much as 25 to 30 percent.

* * *

[COURTEAU] A . . . Because I believe my friend's statement is likely accurate, *and* that it likely applies to many other reservations besides Standing Rock.

* * *

[COURTEAU] A . . . I recall, sir, was the Mayor of Isle commenting that he had heard directly from developers, who were interested, possibly interested, in developing in the area, that they weren't interested in doing so *until* this issue gets resolved.

* * *

[KNUDSON] Q Do you believe that requiring property owners to disclose the existence of this boundary dispute in real estate transactions has an effect on property values?

[COURTEAU] A I do, but I don't know how to measure it.

[KNUDSON] Q You think it would have a negative effect, sir?

[COURTEAU] A Yes.

* * *

[COURTEAU] A . . . The comment that my friend made to me was that it was his feeling that the property values on reservations was likely to be diminished by up to 25 or 30 percent.

[KNUDSON] Q Do you believe that the existence of the boundary dispute regarding the existence or nonexistence of the 1855 reservation has had a negative effect on property values within the affected area?

[COURTEAU] A Yes.

Excerpts from Courteau Deposition, at 68-69, 71, 72, 96-99 (Def. Mem. Supp. Summ. J., Ex. C) (emphasis added).

APPENDIX B

[SEAL]

UNITED STATES DEPARTMENT OF THE INTERIOR

OFFICE OF THE SOLICITOR
Office of the Field Solicitor
Federal Building, Fort Snelling
Twin Cities, MN 58111

February 28, 1991

BIA.TC.3397

Mr. Earl J. Barlow
Minneapolis Area Director
Bureau of Indian Affairs
15 South 5th Street
Minneapolis, Minnesota 55402

Re: Mills Lacs Reservation Boundaries

Dear Mr. Barlow:

This is in response to your request that we provide an opinion on the issue of the boundary of the Mills Lacs Indian Reservation. From time to time, various entities have speculated that the boundaries established by the Treaty of February 22, 1855, 10 Stat.1165, have been disestablished such that the reservation has been diminished and presently consist of lands held in trust for Mille Lacs Band (or the Minnesota Chippewa Tribe). For the reasons set for the below, it is our opinion that the boundaries established by the 1855 treaty remain intact and that the reservation has not been diminished.

* * *

In short, the circumstances of the Mills Lacs Reservation do not parallel either the Red Lake ceded area or the four townships ceded at White Earth. There is no clear evidence

that Congress intended to reduce the boundaries. Given the judicial standards governing analysis of boundary issues, we are of the opinion that the Mills Lacs Reservation boundaries encompass the territory described in the Treaty of 1855.

Sincerely yours,

/s/ Mark A. Anderson
MARK A. ANDERSON
For The Field Solicitor